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A TIME FOR PROGRESS

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ARGUMENTS, DECISIONS AND OPINIONS ON APPEAL
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Ann Arbor, Michigan

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JOURNAL OF THE AMERICAN JUDICATURE SOCIETY

Volume 26 DECEMBER, 1942 Number 4

War Time Public Services in Lawyer's Field

OUR FIGHTING FORCES have accepted so many lawyers, and so many other lawyers are engaged in technical services for the duration, that it is quite possible that there will not be a sufficient number available for the ordinary services needed by clients, in and out of court.

The courts will be manned and litigation need not be delayed. By consent various time-saving devices may be employed. In the article by Percy Werner on page 114, the saving of time in court is proposed by submitting civil suits to lawyer-arbitrators. It should be unnecessary to elaborate this proposal. It is entirely without technical difficulties. One or three lawyers may be chosen to decide cases, with or without a right of appeal, under the standard arbitration acts. It is submitted that this practice would greatly dignify the profession.

It is not too early to consider what important jobs are likely to await the conclusion of hostilities. Let us select just a few which are virtually above controversy.

There is the very simple matter of building up the local bar association according to the specifications laid down by Emil E. Storkan. There are hundreds of half-grown bars in small and medium sized cities that can assuredly become in a year or two all-inclusive and with influence certain to improve local public opinion. The way to do it was presented in the JOURNAL of October, 1941, 25:76.

It will cost the lawyer nothing, and help to enhance the Bar's reputation, if the key-number system of selecting jurors is adopted. It is a marvelous success. Of course it is conceded that some lawyers, and perhaps a considerable proportion of those who defend criminals, do not want intelligent jurors. They should be put on the defensive. It is also readily possible to greatly reduce the cost of jury trials which is charged against municipalities. A summary appears in the JOURNAL of June, 1941, 27:25.

A great saving of money, accompanied by a real enforcement of laws against criminal conspiracies, will be obtained in any state that follows Michigan's example, and permits judges to possess all the powers of a grand jury. It was accomplished in Michigan in 1917, by a mere act of legislature. No other grand jury except the one-judge kind, has been employed since. There is recent news about this in the JOURNAL of August, 1942, 26:42.

Detroit is probably the only city in the country in which bail bonds are superior to nearly all bonds issued by private corporations. Read about this simple and perfect system in the number above cited, page 40. It should not be necessary to await the end of war before other large cities have the Detroit system.

Another economy which saves time for lawyers, and which need not wait if practitioners want to dispose of complex issues, is the use of three judges. This is authorized by statute in Michigan and in the larger cities of all states

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it could doubtless be employed if counsel would join in an invitation to the bench.

Of course there are many other ways of saving time, and time now is in many instances more important than cash. All experiments should be reported to the Judicature Society.

Missouri Judicial Selection Plan Wins Again

The December JOURNAL went to the printer as the November votes were being counted, but it was already apparent that the Missouri voters had registered a greater approval of their new system of selecting judges than when they first accepted it in 1940.

The constitutional amendment establishing it was adopted with a majority of 100,000 votes. (See this JOURNAL, 24:118 and 24:194.) Thereupon opponents in the legislature put through a proposal to repeal it, known as the Lauf amendment. They argued that the plan smacked of fascism, and had been "put over" without being fully understood, in spite of widespread publicity by the Missouri Institute for the Administration of Justice. Meanwhile, the plan was in effect and a number of judges had been chosen under it.

The action of the voters in this election should silence the opponents for all time. Although it was an off-year election with a smaller total vote, the "no" votes on the Lauf amendment had rolled up the resounding majority of 132,000 and a final majority of 150,000 was expected. And Mr. Lauf, the sponsor, was defeated for reelection to the legislature. In the same election Missouri voted to hold a constitutional convention. Congratulations to a progressive state!

Concise Opinions Are Not Impossible

Not all of the projects in the field of judicial administration are applicable to every one of our forty-eight units of government which have exclusive power to act. The matter of deciding cases on appeal and writing opinions is dealt with pretty well in a few states. With them it is more tradition and good fortune than conscious effort. If the tradition is one that insured long tenure to competent judges the better results in opinion writing may be attributed to the fact that the lawyers have a firm confidence in the wisdom and probity of their judges, and the judges do not live in fear of dangerous competition in the next election.

Other factors may be suggested. Commercial and industrial affairs may be less complex; a long line of consistent decisions tends strongly to discourage lawyers from gambling with appeals; the practitioner's reputation in a long settled community is a guaranty alike to the interests of clients and of judges.

In a great majority of the states, in which about five hundred supreme court justices function, there is room for improvement in the most difficult field of law administration that exists in any modern nation. For a generation or more the American Bar Association has offered sensible criticism and wise standards. Here and there a little progress has been made.

The Editor's immediate purpose here narrows down to that of advertising Edson Sunderland's wise counsel concerning opinion writing which is presented in this issue. In this article the reader finds a direct, sensible analysis of what has to be done to produce a convincing decision and a written opinion which should satisfy all standards, including brevity of words.

The simple conditions predicated for this extraordinary improvement of justice and of jurisprudence are few, and easily within reach of a majority of the courts of review. In a number of them decisions are made by a group of three judges. The reader will be interested in the brief, but convincing, argument for a small court. And the reader will bear in mind the fact that three judges suffice in numbers for the federal courts, always held in esteem.

Supreme Court Holds Key to Procedural Progress

JAMES P. ALEXANDER, C. J.*

AT THE MEETING of the American Bar Association in Detroit Judge John J. Parker called a meeting of the committee for Improving the Administration of Justice, of which he is chairman. It was in the nature of an "experience" meeting. Representatives from the various states were called upon to report successes or failures in bringing about procedural reforms. Much more interest was shown in the meeting than had been anticipated. Some who wished to attend had to be turned away.

As the reports of the various representatives came in, there was one very noticeable fact relating to all of them. It was this: in every state where the supreme court was in favor of procedural reforms, no difficulty was encountered in bringing about the desired changes; but in every state where the supreme court had opposed reforms, no progress had been made. It is well to ponder this fact for apparently therein lies the key to success or failure in bringing about reforms in our judicial system.

If the supreme court is in favor of reforms, the reforms can be had; otherwise they can not This is so for two reasons. In the first place, practicing attorneys do not like to run the risk of incurring the ill will of the supreme court by taking a position contrary to that advocated by the court. In the second place, the legislators assume that if any reforms are needed, the court will suggest them; and that if the court opposes reforms, they are not needed.

TRIAL JUDGE ASSUMES A RISK

The supreme court is far removed from the trial courts; and if the appellate judges do not have frequent conferences with trial judges and practicing attorneys for the discussion of procedural matters, they lose touch with the situation and fail to understand and appreciate the difficulties that are being encountered in the trial courts.

It should be remembered that the appellate judge is not required to elect in advance which of two doubtful courses he must pursue. He merely sits in judgment after the trial judge has made his choice. The consequence is that inferior rules do not bother the appellate judge. In fact, it is often more convenient for him to continue to make the same rulings under the old rules, that it is to learn how to interpret new ones.

Moreover, being on a salary, with perhaps more work than he can handle, he does not realize or appreciate the fact that the lawyer is rapidly losing his business through the creation of bureaus and the work of boards of arbitration. He does not realize that, due to the long delays and the uncertainty of being able to successfully pilot a case through court under a set of worn-out rules, the average citizen has become wary of the courts, and prefers to settle his case without the aid of court or counsel—even though the settlement is an unsatisfactory one—than to take the chance of securing a decree. The consequence is a heavy loss to clients as well as counsel.

Obviously the remedy lies in educating the supreme court to an understanding of the difficulties under which the lawyer and the trial judge are laboring, and of the need of reforms. This can be done by holding frequent meetings of the bar for the discussion of needed reforms, and having the members of the appellate courts present to hear the discussions. Care should be exercised in arranging the program for such a meeting. There should not only be a discussion of reforms generally, but the need of specific changes should be pointed out. What is being done in other states could be looked to with profit in arranging such a program. If the members of the appellate courts can be induced to attend such meetings, and hear discussions showing a real need for reform, they will soon fall in line and cooperate in the movement.

*The Author, as Chief Justice of the Texas Supreme Court, has been a leader in the great reforms accomplished in his state.

Arguments, Decisions and Opinions on Appeal

BY EDSON R. SUNDERLAND*

The Problems Involved—After the record on appeal has been prepared and filed in the appellate court, there are still three tasks to be performed in completing the proceedings for review: 1. Counsel must present to the court the facts and the law upon which they rely; 2. The court must consider the matters so presented and reach a decision thereon; 3. A record of the decision must be prepared and filed in the cause. Each presents difficulties.

The case may be presented by written brief or by oral argument or by both. In England the oral argument is the universal and exclusive method employed. In this country, on the contrary, the written brief is the universal and primary means for presenting a case on appeal, but it is not exclusive, and an oral argument may be, and usually is, added.

THE WRITTEN BRIEF

The art of brief writing has not reached a high level of development in this country. Briefs are usually too long, devoid of style, and badly arranged. No other type of literary composition fails so generally to meet even the most elementary standards of literary form.

The problem of writing more effective briefs is primarily one for the individual brief writer, and yet something can be done by rules of court.

Prolixity, while it cannot be prevented, can be discouraged by a rule that no more than a designated number of pages in any brief shall be taxable as costs. This plan for limiting the length of briefs is recommended by the American Bar Association.[1]

So, also, it has been found possible to eliminate some of the confusion which results from faulty analysis and bad arrangement by a rule requiring concise and separate statements of the controlling points involved.

A technique for this purpose was devised by the Supreme Court of Pennsylvania. By rule of court it is required that the appellant shall, on the first page of his brief only, and without any other matter appearing thereon, set forth separately each question involved in the case, in general terms and without names, dates, amounts or other particulars, and whenever possible follow the question by a statement as to whether it was affirmed, negatived, qualified or not answered by the court below.

If such an analysis is made, and the controlling questions are stated, a brief supporting or opposing the answers to those questions as given by the court below can hardly fail to present an intelligible view of at least the main features of the case.

This plan has been followed in Connecticut, Michigan and Florida, with satisfactory results. It is simple and effective, and might well be used by brief writers as an aid in the preparation of briefs even though not required by the court.

THE ORAL ARGUMENT

Not all courts encourage the use of the oral argument. In some states it is not a matter of right but leave must in all cases be asked within a limited time. In many states the length of the oral argument is severely curtailed. A common deterrent is a real or supposed lack of interest in the oral argument shown by the appellate judges. Some of them frankly express doubt of its utility as currently employed.

On the other hand, members of the bar are almost unanimously in favor of preserving and encouraging the oral argument as an aid to counsel in presenting his case. They are reluctant to rely upon written briefs alone, partly because they believe that the briefs can

*The Author is widely known for his leadership in respect to reform in modes of civil procedure. In the University of Michigan Law School he is Professor of Law and Legal Research; he is a member of the U. S. Sup. Ct., Advisory Committee; he drafted the Michigan Court Rules and the Illinois Civil Practice Act; as Secretary of the Michigan Judicial Council he has directed the significant studies made by that agency. This article appeared first as number seventeen of the series of Judicial Administrative Monographs, published for the American Bar Association by its Special Committee on Improving the Administration of Justice.

1. 63 A. B. A. Rep. (1938) 522, 608.

be effectively supplemented by oral explanation and partly because they are afraid that the briefs will not be read by all the members of the court.

The fear that only a single judge will read the briefs and record and will thereby exert a controlling influence over the decision of the case is widely prevalent among members of the bar. The feeling is fostered by the American practice of having one judge deliver the opinion of the court. The disquieting question constantly arises in the minds of defeated counsel,—How much knowledge of the case did the other judges possess as a basis for their concurrence?

When an oral argument is made, counsel at least knows that every judge who actually sat upon the bench heard what he said. The oral argument is therefore considered by the bar to be one of the most effective means for preventing "one-man" decisions.

Its intrinsic value in supplementing and clarifying the material in the brief depends, of course, on how the argument is presented. The average quality is poor, which may account for the low estimate of its usefulness held by many judges. But there can be no doubt that its possibilities are very great. To fully realize this one need only sit for a day in the English Court of Appeal, where the oral arguments constitute the sole means for bringing the views of counsel to the attention of the court.

If the oral argument is to perform the functions which in theory it ought to perform, its technique must be improved and the conditions necessary for its effective use must be determined and provided. This will require the close cooperation of bench and bar, for the presentation of the argument by counsel and its reception and use by the court are reciprocal processes.

Various methods for improving the effectiveness of the argument have been suggested and tried. Some of them are the following:

1. In order to eliminate the waste of time so commonly caused by discussion of trivial and uncontested matters, require each party to submit to the other, ten days before the hearing, a list of points to be urged, and allow no others to be discussed.

2. Organize the work of the court so that each judge will have an opportunity and will feel an obligation to become informed of the questions involved in advance of the argument.

3. Require the judges to designate in advance of the hearing the points upon which they would like to hear argument, and give counsel sufficient notice thereof.

4. Encourage more active participation in the argument on the part of the judges.

5. Allow more time for the oral argument, and if necessary for this purpose, provide that the court shall sit in divisions.

6. Require one of the judges to prepare a statement of the facts and the points involved to be read to court and counsel when the case is called, and to be thereupon settled in a form satisfactory to counsel on both sides before proceeding to the argument.

7. Employ the Pennsylvania rule already described, in order to provide the judges with a brief statement of the questions which can be quickly read before the argument.

8. Enable the judges to make effective use of the oral argument while it is still fresh in mind, by holding short and frequent sessions, and by finally disposing of the cases heard at one session before proceeding to the next; or by holding a conference immediately after the argument to arrive at a tentative decision.

CONSIDERATION AND DECISION BY COURT

This is a subject which is difficult to deal with because no one outside the membership of the court has any personal knowledge of how the judges prepare for the conference or what occurs when the conference takes place.

A conference is an inadequate safeguard against a "one-man" decision unless it is based on a prior study of the case by each judge. If one member of the court prepares the statement of facts or memorandum of opinion upon which the judges act in conference, he obviously holds a position of superior and perhaps controlling influence if the others are not able to fully check and verify his interpretation from their own investigation of the facts and the law.

A judge who has not read the record or briefs is naturally reluctant to oppose the views of a judge who has read them, with the result that the court is inclined to follow the lead of the judge who has specially studied and reported upon the case.

"One-man" influence over the conference at which the case is decided may be diminished by the oral argument, but this is not enough. There should be a sufficiently detailed study of the case by each one of the judges, prior to the conference, to give him the basis for an inde-

pendent opinion in regard to it, and to enable him to participate fully and on equal terms in the discussion of the questions involved.

And not only should this preparation be made, but a procedure might well be adopted which would enable the minutes of the court to show that the provisions for securing such preparation had in fact been carried out. This would help to allay the doubts and suspicions which too frequently impair the confidence of the bar in the decisions of the court as the joint product of all the judges.

ONE INSTANCE OF EFFICIENT METHOD

Such a procedure would not be difficult. The Circuit Court of Appeals of one circuit has employed the following plan. After the oral argument and on the same day, a preliminary conference is held. Each judge then prepares a separate written memorandum opinion covering the facts and the law, which invariably requires him to make an independent study of the record and briefs. A final conference then takes place at which each judge presents his view of the case and usually reads his memorandum opinion. The case is thereupon decided and one of the judges is assigned to write the opinion of the court.[2]

One of the associate and advisory members of the committee of the American Bar Association on Improvement of Appellate Procedure, who had enjoyed a broad experience as an appellate judge, expressed the view that no case should be called for oral argument or should be considered on briefs, until every judge had certified in writing that he had read the briefs and had examined the record in sufficient detail to fully understand the nature of the case.[3]

THE LARGE COURT DESTROYS EFFICIENCY

Doubtless the tendency to "one-man" decisions is greatly increased by the heavy load of cases carried by many appellate courts. It is often impossible for each judge to find time to familiarize himself with the briefs and records in all the cases which he is required to vote upon at the conference.

This difficulty can be effectively met by organizing the court into a sufficient number of divisions.

Assume that a six-judge court will write 300 opinions a year. Working as a unit it will divide this load equally among its members, each being assigned 50 opinions. This opinion load will not change if the court sits in two divisions, for each division will then write 150 opinions and each of the three judges in the division will still write 50 of them.

But every judge is also required to pass upon all the other cases coming before the court, in which he does not write opinions. These are the cases about which the bar is specially concerned. In the above-mentioned six-judge court sitting in banc, each judge would have to deal with 250 such cases. But if that court should sit in two divisions of three judges each, then each judge would have to deal with only 100 such cases, which would give him more than twice as much time for each one.

The advantage increases with the size of the court. If the court has nine members and each member writes 50 opinions, the docket will consists of 450 cases. This means that if the court sits in banc each judge will have to deal with 400 cases other than those in which he writes opinions, while if the court sits in three divisions of three judges each there will be only 100 such cases for each judge to deal with.

It is possible that the time gained by such an organization of the court would not be completely translated into a more extensive examination of briefs and records. But there can be no doubt that it would greatly reduce whatever tendency there is toward "one-man" decisions.

A practice which contemplates that every member of a large court individually shall read the briefs and record in every case coming before the court, calls for an enormous amount of duplication of effort which is difficult to justify. There should be *enough judges to provide adequate opportunities* for the development and discussion of different points of view. Beyond that additional judges contribute little except to an increased output. *It has never been seriously contended that the addition of more judges improves the quality of the decisions rendered.* Almost all the courts of last resort in the United States have been three-judge courts for considerable periods, and they were enlarged in size not because of

2. 63 A. B. A. Rep. (1938) 522, 611.

3. 63 A. B. A. Rep. (1938) 522, 611.

dissatisfaction with the quality of the judicial service rendered, but because of the necessity of utilizing whatever advantage could be derived from a larger court in dealing with the increased load of business.

THREE-JUDGE COURT IS THE BEST

A three-judge court is *ideal for the efficient handling of appellate business.* The English Court of Appeal has always sat in divisions of three judges, with complete satisfaction to the bar and the public. So do the federal Circuit Courts of Appeal, although the number of circuit judges varies from three to six and additional judges can always be called from the district bench to sit upon those courts. So far as the great mass of ordinary litigation is concerned, they are practically courts of last resort.

Coordination among different divisions of the same court, so as to eliminate inconsistent holdings and avoid decisions that do not in fact represent the views of all or a majority of the judges, is merely a problem of mechanical detail. Various plans have been successfully employed.

The objection often suggested that no appellate court ought to act, except through a majority of its members, is theoretical and traditional, and draws no support from the results of experience. The English Court of Appeal never sits with a majority of its members present, nor does the Judicial Committee of the Privy Council, and cases are constantly heard in the House of Lords by less than a majority of the judges.

THE OPINION OF THE COURT

The bulk of judicial opinions currently published is appallingly large. Many of them could be greatly reduced in length without impairing their value.

A mere order affirming, reversing or modifying a judgment is unsatisfactory to the parties, because it contains no showing as to what matters in controversy were actually considered and decided or what reasons influenced the court. Such a showing is generally considered a reasonable and proper protection against judicial oversight and error.

But an opinion containing such a showing may nevertheless be very short. Most cases involve no new principle or novel application of the law, but are controlled by simple and well established rules. In such cases it would seem sufficient to give a summary of the facts and a brief statement of the controlling propositions of law. If the case is one falling clearly within the rule stated in a prior case, a summary of the facts with a reference to the prior controlling decision would serve every purpose of a fuller discussion. Cases clearly controlled by statutes would fall in the same category. In most cases of the types here referred to, long and detailed recitals of facts tend to confuse rather than clarify. These proposals have been approved by the American Bar Association.[4]

Many cases involve merely questions of fact and the weight of evidence, and opinions in such cases hardly serve any useful purpose beyond demonstrating to the parties that the court understood the issues and gave them adequate attention. To do this will not necessarily require a long opinion.

A few cases involve difficult problems as to what the law is or ought to be, or whether and how it should be applied in novel situations. In such cases an exhaustive study may be called for, with references to many cases. But even here it is easy to expand an opinion far beyond a proper length. The principle of stare decisis impliedly imposes upon the writer of the opinion the obligation to refrain from obiter dicta and to confine himself to the precise questions involved. Observance of this rule would go far to reduce the unnecessary length of opinions.

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4. 63 A. B. A. Rep. (1938) 522, 613.

Pretrial Is Readily Adapted to Rural Counties

"Business is always willing to pay well for prompt and efficient service. That is what this procedure aims to provide. There is every reason to believe that it will be a financial benefit to the profession."

THE SIGNIFICANT WORK done recently in North Dakota by the Code Commission deserves consideration. Its proposals will be laid before the legislative session of 1943. If accepted that state will be immeasurably benefited.

The unique method of accomplishing this work originated four years ago in South Dakota, and was briefly described in this Journal (23:20). The South Dakota legislature, in authorizing a revision of the code of substantive law included also the drafting of a schedule of rules of civil procedure. It was provided that the legislature, at its succeeding session, should pass upon the code of substantive law, and that the procedural rules should become law upon receiving the approval of the supreme court. To avoid difficulty in determining what might classify as substantive law, and what procedural, the code commission obtained sanction of its proposed rules by both legislature and supreme court.

The control of procedure by the South Dakota supreme court was confirmed by a provision in the code that authorized that court to make rules of procedure for all courts and quasi-judicial bodies. As to any existing statute concerning procedure, or any statute subsequently enacted, it was provided that it should have effect only as a rule of court, subject to amendment or repeal by the court.

To insure interest in the development of procedure by the supreme court it was further provided that any five lawyers might join in a complaint concerning any detail of the procedural law, or in a proposal for a new rule, with a court hearing on like notice; and the court should adopt a rule as to adequate notice of the nature of any procedural rule upon its adoption.

In this novel and effective manner the laws and procedural rules were raised to an ideal standard. All of the program was accomplished.

In North Dakota there has been not only the excellent example set by its neighbor state, but also more time, a matter of consequence. The committee on procedure of the code commission has comprised E. T. Conmy, John J. Kehoe, Nels G. Johnson, A. M. Kvello (since deceased) and, as Chairman, Judge Gudmundur Grimson, of Rugby, who was given leave of absence for two years. It appears to have been a most successful plan.

References to progress have appeared in two numbers of this Journal (23:20, 26:38).

For ten years the North Dakota State Bar had struggled to improve the administration of justice, and with little success. The pass of Thermopylae is suggested by the ability of a few key men in legislature to prevent the passage of measures which they do not approve. A little group of lawyers temporarily entrusted with membership in the legislatures have easily balked reform measures in a score of states. And the theory of legislative control of procedural rule-making, developed in a period when there were no spokesmen for inherent judicial power, proved in hundreds of instances to be fatal to the development of a modern, rational system of procedure.[1]

At the 1942 meeting of the State Bar of North Dakota, which is the oldest integrated bar in the country, Judge Grimson read an address concerning the studies made of pretrial hearings in North Dakota by himself and by other judges. While any judge can experiment with this effective tool it is by no means common for judges to venture into a new practice without formal rules.

The pretrial experimenting in North Dakota, as the reader may suspect, has been a great success. There was some doubt in the large cities whether the mere mechanics of pretrial could be adapted to rural districts. It is hardly necessary to say that North Dakota, with its huge farms, is about as thinly populated as any well developed region.

There were formidable problems, never before approached. The judge who serves two or

1. See Historic Blunder in Construing Constitutions, Jour. A. J. S. 26:85.

more counties has the great inconvenience of being away from home much of the time. To open court in each county twice as many times as required might be assumed to be impractical from the standpoint of counsel as well as judges.

FIRST EXPERIMENTS WITH PRETRIAL

At Rolla a special term was called two weeks in advance of trial for the preview of the entire calendar. On the civil calendar two cases were consolidated. In another case a jury was waived and negotiation was opened for settlement. The criminal calendar carried fifteen cases. In all of them pleas were entered and preliminaries disposed of, or dismissal granted. In one case, assault with a dangerous weapon, jury was waived and trial was set for the following week in the county in which the altercation occurred, affording a saving of about three days of the court's time and also witness fees and mileage.

On the hearing it was disclosed that the injury grew out of a line fence boundary, and trial to the judge permitted of a more satisfactory solution than could be possible otherwise.

At the conclusion of the conference only four jury cases were left for trial, so that it was estimated that the county of Rolette was saved approximately $750 and counsel were saved a great deal of time otherwise required for preparation.

MANDATORY PRETRIAL RULE PROPOSED

The rules committee has recommended that a rule be adopted, like the federal pretrial rule, but mandatory. This proposal in practice means that all cases shall be called and analyzed at pretrial conferences. Every element will be subject to consideration. With some of the cases it will be merely a matter of finding out what they are about and what may be the most advantageous mode of dealing with them. In the larger cities the judge may well preside at pretrial conferences at times convenient, rather than at fixed times.

In rural districts the judge will have to make special trips to each of his county seats about two weeks before terms. This is shown to be no burden, but an actual saving of the judge's time. The tests have been sufficient to show a substantial saving on the part of the judge.

Counsel who have statewide practice may be inconvenienced in some instances, but most of them have local attorneys in each county seat, or can easily secure local representation, and so be sure of participating in the economy of time and expense. The proposal is also made that when there are only a few cases set for jury trial there should be opportunity to transfer them to an adjoining county, affording a saving of time and money. The excellent highways make such transfers practical.

Judge Grimson's experiments justify the hope that there shall be under the new rules a preview of all criminal cases. Defendants should be required to give notice of affirmative defenses, which would enable the state to investigate such defenses and ascertain their merits. Experience has shown that such previews often make trial unnecessary, sometimes by a change of plea to guilty, sometimes by abandonment of the prosecution. When insanity is alleged the pretrial conference may obviate the need for trial.

Experience with pretrial in criminal cases has not been common, but where tried, it has yielded results of great value. A plea of guilty or an order of acquittal and release not only benefits both state and respondent, but goes far in protecting society. Further, it builds confidence in the courts and in the legal profession.

With this profuse introduction, parts of which summarize portions of Judge Grimson's address too long to be printed, a condensed version of the remainder of the address so far as it bears upon these problems is here presented.

BAR CAN RECOVER PUBLIC CONFIDENCE

"The legal profession, which we who are in it know is a noble profession, is nevertheless subject to much public criticism. Our work is in the open. It involves conflicting interests. If an advocate becomes over zealous or employs questionable means in the interest of his client, such facts are readily ascertainable and seized upon by the other side, to the disparagement of the whole profession.

"We are accused of employing dilatory tactics. We are criticised for technicalities. The layman says that the procedure in court is too

slow, too expensive and that the results are too uncertain.

"I have now been in the practice of law in North Dakota since 1906. I have been on the district court bench since 1926. I believe I have had sufficient contact with the practice of law in North Dakota, both as an active practitioner and as a judge, to form a definite opinion as to the justice of these criticisms concerning the profession in North Dakota. It is my considered judgment that they have no adequate basis in fact.

"Nevertheless, by and large, there is no doubt that the legal profession has lost confidence and been ousted from many of its former activities. It has been suggested that this has been due to procedure which is too much bound to the formalities of the past and has not adjusted itself to the speedier tempo of present progress. For some reason a part of the proper business of the courts has passed out of the hands of the profession to administrative bodies. Many contracts are entered into by business men providing for arbitration by laymen rather than judicial settlements of disputes. Perhaps this has given speedier decisions, but that they have been more just no one can claim. To suggest that an administrative body can be both prosecutor and judge and arrive at a just verdict is contrary to human nature and experience. The decisions of some of those administrative bodies bear that out.

"However, it behooves us, as a profession, to take stock of our procedure to determine what steps, if any, are out-moded and what means and what substitutes should be employed to overcome some of the legitimate criticisms and yet forfeit no essential feature of our judicial system.

"It seems that was what our legislature must have had in mind when it created a Code Commission to 'revise' the laws but to 'prepare' a set of rules of procedure, Chapter 110 S.L. 1939. It did not limit the rules to revision but gave the commission authority to make such rules as would best obtain justice under present conditions. See also Chapter 238 S.L. 1941.

ONE SIDED PLEADINGS CONCEAL ISSUES

"The theory in the past seems to have been that the parties to a litigation, or rather their attorneys, should entirely and unaided by the Court determine the procedure up to the actual trial. The complaint is prepared upon the one-sided statement of the plaintiff, often exaggerated. Counsel usually has to prepare the complaint in a hurry and has no time to verify the statements of his client. So the answer is prepared in a similar manner by the attorney for the defendant. Consequently the issues as presented in the pleadings are often found, upon actual trial, to be sham issues in many respects. This method has been the cause of much useless expense, trouble and delay. There have been cases in this state which have gone to the Supreme Court on demurrer to the complaint or the answer where the facts, upon final trial, have not been at all those alleged in that complaint or answer.

"Attempts have heretofore been made to remedy the situation by examination of the parties before trial, by taking depositions, and in some cases, by procedure for discovery. These, however, have always been at the instance of counsel and have not been widely used.

"To further avoid the waste caused by that theory of procedure attempts have been made, at various times in the past, to give the Court more control of the case before actual trial.

PRETRIAL A CENTURY AGO

"The first attempt to that end seems to have been made on a limited scale in England in 1831. A statute was passed providing that when a defendant was sued for property to which a third person also made claim, the Court might order the third party claimant to appear and state the nature and particulars of his claim, and that the Court should then hear the allegations of the rival claimants and frame the issues between them and proceed to the trial of the same.

"In 1868 Parliament revised the practice of the Court of Sessions of Scotland and provided that in every case after the pleadings were in there should be a hearing before the judge, at which the pleadings should be adjusted. At that time the judge was to require the parties to state what proof could be stipulated and to determine the issue, or issues, that were to be tried.

"The Scottish practice led to the introduction of Summons for Directions into the English procedure in 1883. This called for a pretrial investigation, and was designed to supplement the pleadings by providing the parties and the

Court with additional information regarding the nature of the controversy. It was discretionary. In 1893 this procedure was made obligatory on the plaintiff. In 1902 and again in 1932 these provisions were greatly extended and required that the hearing be conducted by one of the judges. Under that rule the judge may give orders regarding pleadings, particulars, admissions, discovery, inspections of documents or real or personal property, commissions, examination of witnesses, place and mode of trial, and so forth.

"In 1934 a Royal Commission was appointed in Great Britain to consider 'The Dispatch of Business at Common Law.' Pretrial procedure formed an important part of the subject matter of its investigation, and its conclusions present an unqualified endorsement of the pretrial hearing and a strong recommendation for widening its scope.

"Similar procedures were adopted in France and Germany and some other European countries before the war.

"Reform along this line in the United States began with the Field Code in the middle of the last century. The theory there, however, was that the ineffectiveness of pleadings was due to technicalities rather than inherent weakness of the ex parte procedure, under which they were framed. It was thought that by simplified pleading this could be cured.

"No further progress seems to have been made until 1912, when New Jersey adopted an optional rule similar to the English "Summons for Directions." This does not seem, however, to have been used to any large extent.

"In 1927 during the great building boom in Detroit, a plan was adopted in the Wayne County Circuit Court of Michigan, in which Detroit is situated, that in all mechanics lien cases immediately after the filing of the pleadings, a preliminary hearing was held to simplify the issues among the various claimants, before taking the proofs. The judges found this system to work so well for the speeding of the disposition of such cases that in 1929 the method was applied to Chancery cases. Finally the pretrial conference was applied in law cases, also.

"During the year 1935 there were 4,965 cases in the Detroit Circuit Court ready for trial. Of these 2,016, or 40.6 percent, were finally disposed of on pretrial conference. In 1936, 49.4 percent were so disposed of, in 1937, 51.1 percent and in 1938, 60.5 percent."

JUSTICE PROMOTED BY CANDOR

"The actual procedure, as far as it is disclosed in the reports, is similar under all the rules. A notice is given to counsel to appear before the court, usually in chambers, some ten days or two weeks before the trial, for this conference. It is in no sense a trial. It is entirely informal. The court has counsel state their position; asks if the pleadings are satisfactory; if any facts can be stipulated; if the foundation for the introduction of documents can be waived; if there is any prospect of settlement, and so forth.

"The atmosphere being informal, there is much more likelihood of getting to an agreement on many of these matters at such a conference than is possible at an actual trial before an audience. The combativeness engendered by a trial is not present. The necessity of maintaining a position taken, to save face with clients or the public, is absent. The conciliatory influence of the court prevails. Often counsel find that there is not so much to their lawsuit as they had been led to believe. They also find that perhaps only one or two items in the whole controversy are in dispute. On such items they are not required to disclose their evidence or the details of their proof, but everything except such items is settled at the conference, and the judge makes his order to that effect which will then control the trial.

"The whole object of these pretrial conferences is simplification of issues and the elimination of unnecessary technical proof of facts and documents. There is implied only that it shall be required that counsel appear before the judge and answer his reasonable questions and the judge will employ his powers to exclude extraneous issues. This is not only the court's right but the court's duty to litigants as well as to itself. This is what the court does now upon the trial. This procedure only advances the time at which the court takes control of the litigation and advances the court's opportunity to save time and expense.

"In that connection may I quote A. Lawrence Lowell of Harvard University. He says 'Real administration of justice is a positive thing. It consists of positive powers, positively exercised. . . . The function of the judiciary is to

administer justice with all that the word *administer* implies. That function is not adequately exercised by sitting on a bench and watching justice float by.'"

SETTLEMENTS ARE WITHOUT COERCION

"The matter of settlement is only an incident of these pretrial hearings. It is not proposed that the judge should urge settlement or use duress in any way. We all know that settlements are frequently made when a case is reached for trial, but that involves the necessity of having the witnesses ready and all preparations for trial made. It also often results in disarranging the trial calendar so that a jury may be idle for hours at a time and cause the court, counsel and other litigants inconvenience.

"The reports also show that it often appears on these pretrial conferences that while there is perhaps no defense and the defendant admits he owes the obligation, the circumstances are such that he cannot pay the full amount at once. In such cases, agreements are made for partial payments at specified intervals. The case is often continued on the pretrial calendar as long as the defendant lives up to these agreements. This would eliminate the ruthlessness necessary upon execution to close a business and sell a defendant out. Instead, he is given a chance to work out his salvation, if possible. That should also lessen use of general denials, which, I suspect, have often been used in the past just for that purpose."

MOST LAWYERS FAVOR PRETRIAL

"It can be safely said that, generally, lawyers, are in favor of this new procedure. Many who have been doubtful of its adoption have, upon trial thereof, become its enthusiastic supporters.

"What this procedure does accomplish, from a lawyer's standpoint, is the elimination of technicalities and of dilatory tactics. It strips his lawsuit down to the essentials. It saves him time and his client expense in preparing to meet such issues as are not disputed; it allows him to concentrate his time and research upon those issues that are in honest dispute between parties; it enables him to give better service to his client than if he had to prepare on all features of the case. It will somewhat overcome the advantage of the old and experienced lawyer over the beginner, and if that advantage is used for delay by means of technicalities the rule will, to that extent, promote justice. All the rights of litigants are still preserved. Such a conference is now often arranged voluntarily between the opposing attorneys in a case. It will, as some attorneys have complained, take some of the drama out of a trial. The object of trials, however, is not to entertain, but to arrive at a just solution of disputes. The trial becomes now more a search for justice than a contest of wits."

WHAT OF THE LAWYER'S INCOME?

"The question has been raised—Will this procedure decrease a lawyer's income? A similar question has always been raised in connection with any time and labor saving device. In actual practice it has always been answered in the negative. New work and increased usefulness of the service involved has always increased rather than diminished the income.

"There seems good reason to believe the same will be the result here. Many wrongs are now allowed to go unsolved because of the delay and uncertainty of legal procedure. In some cases arbitration or administrative decisions have been substituted, with less cost in time and money. Many matters now considered of too small importance to warrant legal procedure will be brought into Court.

"Business is always willing to pay well for prompt and efficient service. That is what this procedure aims to provide. There is every reason to believe that it will be a financial benefit to the profession.

"In two murder cases that have recently been tried before me the same special counsel was employed for the State. In one a trial of ten days resulted in a verdict of guilty. In the other a half day's presentation of the State's evidence resulted in a plea of guilty. The same fee was paid that attorney in both cases. The prompt disposal of the second resulted in so many other savings the Commissioners would have been willing to pay even a larger attorney fee in that one. They were better satisfied. That is a typical illustration. A lawyer's final income will always be measured by the satisfactory services rendered his cients. Prompt and efficient service increases that satisfaction. This procedure gives an attorney better opportunity to render that kind of service.

"No actual statistics on the effect on a law-

yer's income have been found, but an inquiry sent out two weeks ago has brought the following replies:

"Ellis R. Diehm, Chairman of the pretrial committee of the Cleveland Bar Association writes: 'We have used pretrial since September of 1939 with success. . . . The cost of the administration of the court has been greatly reduced. With reference to the lessening of the income of lawyers . . . the lawyer really benefits, not only in the preparation, but in handling of the cases and in income by the expeditious use of pretrial.'

"Lowell S. Nicholson, Executive Secretary of the Boston Bar Association writes: 'The pretrial procedure as we have it in Boston, and in some of the other counties of this Commonwealth, is considered to be very much of a success. Almost without exception the attorneys are very favorably disposed towards it. I do not believe it has very much effect upon the income of trial attorneys. In a few cases it may be that the pretrial procedure brings about a settlement without trial, and in some of such cases the attorney's fee may be less than if he had won a verdict after trial. On the other hand, a great many cases which would inevitably be settled before trial now go through the pretrial hearing; a settlement is then agreed upon, and in such cases the attorney can add a small additional charge to his fee because of there having been some sort of a hearing. On the whole, however, I would say that the entire procedure has little effect on the income of trial attorneys.'

"Honorable Joseph A. Moynihan, Judge of the Circuit Court, Detroit, Michigan, who has done so much to encourage pretrial procedure in this country, writes: 'From my experience with this particular practice and from what lawyers have told me, I find that it in nowise decreases their income, but on the contrary, the time saved in actual court trial has aided them in disposing of other matters which were challenging their attention.'

"Our honored former citizen, the Honorable J. F. T. O'Connor, now Judge of the United States District Court in Los Angeles, had experience with the pretrial rule both as a practitioner in the Superior Court and later as a federal judge. He writes:

" 'The practical advantages of these pretrial hearings have been conclusively demonstrated to me beyond the preadventure of a doubt, and I unhesitatingly join my fellow jurists throughout the country in approving the efficiency of the pretrial hearings when properly administered. It has been my personal experience that they have resulted in a large number of settlements before trial; and, in those cases which have subsequently been tried, reducing the time of trial, thus keeping the trial docket current.' "

A Typographical Error Corrected

Judge Charles E. Clark's scholarly article in the recent October number of the JOURNAL, entitled "Simplified Pleading and the Demurrer" suffered severely in one paragraph from the juggling of several linotype slugs. Under the sub-head "Effect of Proposed Change" near top of the second column on page eighty-four, the correct text of the first ten lines should read as follows:

"A further note of explanation of proposed Rule 12 may be desirable. In it the long (b) of the existing rule would become the short (a), a simple statement of the English system of objections in law as a part of the answer; present (d), concerning preliminary hearings, would become new (b), but in the English form, wherein hearing at trial is made the more usual course; present (c), (e) and (g) would all be omitted, thus eliminating motions to correct pleadings and anything equivalent to the old formal demurrer; present (f) would be (c) limited to the English summary motion for clearly improper pleadings, and the present (h) would be restated as (d) to define waivable and non-waivable objections."

If the essential function of courts, the administration of the law, is to be performed efficiently, it must be performed by judges who are competent. A popularity contest is no more adequate to determine the competency of a judge than the competency of a surgeon, a teacher or a mechanic.—*Robert N. Wilkin, J.*

Who are the Opponents of Bar Integration?

THE CLAIMS set forth for bar integration have been fully substantiated. Success came in most of the twenty-seven states despite stubborn resistance. No very long experience was required to prove the value to the profession of self-government and self-discipline.

There are ten or more other states in which effort has been made, as yet without success, to achieve the status of integration. Lack of success in these instances justifies consideration of the motives and interests which stand in the way of greater public service and greater benefits to bar members.

Why should lawyers thus set themselves against a movement so demonstrably for the profession's best interests?

A certain percentage of the lawyer opponents of bar integration can no doubt be accounted for on the ground of misunderstanding and ignorance of the true meaning of integration. Witness, for example, a prominent lawyer at an integration hearing arguing that integration should not be adopted because the committees of the voluntary association are doing excellent work which it would be a shame to discontinue! Integration of a state bar does not involve the loss of a single committee, nor abandonment of a single project now under way, as the veriest primer of integration would reveal.

Witness, also, the oft-repeated argument that integration would result in an organization dominated by the big city lawyers, in spite of the well-established facts that the Seattle crowd, the New Orleans crowd and the Detroit crowd are less in control now than before, due to democratic rules compelling equal representation for all districts of the state.

It is possible to be passively sincere and misinformed, but it is hard to see why any member of our profession, earning his living by capitalizing the power to reason correctly, would go out and engage in an active campaign against integration without first having fully informed himself regarding it. That is not the way cases are won for clients.

A second group of lawyers are opposed to integration not because they do not understand it, but because of their individual interest in a half-organized profession. They are frankly satisfied with conditions as they are and do not want them changed. It is easy to see how a lawyer busy with a profitable practice would decline to devote time and effort to improvement of a system which happens to be serving him well, but it is inexcusable for a lawyer aware of the needs of the day, and the part the organized bar must assume in supplying them, to argue that his state bar association is now rendering a complete service to the profession, to the courts and to the public. Among the integrated states are many that had excellent voluntary associations before—in fact the vigorous work of most of those groups made possible the achievement of integration in their states. Who can cite a single instance of a live state bar association which has acquired integration and has not thereby increased its influence and its capacity to serve its members?

Look at the Texas Bar Association, for example. No voluntary bar organization in the country was thriving more than that one three years ago. Attendance at its annual meeting had been boosted astonishingly; so had its membership. What happened to attendance figures after integration? They swelled to a point rivalling that of the American Bar Association. Committee activity was good before and is better now, as a perusal of the State Bar Journal will disclose. If the apostles of the *status quo* had had their way in Texas, the state would today have a good bar association, without a gence, and refuse the best merely because they to that system now.

Any housewife knows better than to take the second best head of lettuce when the largest, firmest and freshest one in the pile is hers at the same price. Are lawyers to show less intelligence, and refuse the best merely because they have the second best?

There is reason for believing that the bulk of active opposition to integration of the bar is not to be found in either of the two foregoing classes. Most lawyers not only ought to be but

actually are too smart to enter into a controversy regarding which they are inadequately prepared. The movement today is promoted by the leaders of voluntary associations of a very high standard of excellence, who strive for still higher levels of achievement. At the bottom of most opposition to integration is likely to be found, expressed or unexpressed, some *personal interest* with which integration of the bar would interfere.

The integrated bar has furnished a more effective system of bar discipline than is possible under any other system. Lawyers of shady ethics, who have had a free hand in less rigidly controlled states, instinctively oppose the disciplinary machinery conferred upon the integrated bar. They do not openly assert that they are opposed to an effective disciplinary system; instead they advance the same old specious arguments that have been exploded time and again but pop up whenever the question is discussed.

Some voluntary associations, instead of being active instruments for the promotion of justice and the welfare of the profession, are virtually the private property of a few leaders who take turns enjoying the honors of official position. By glancing at the first page of the annual report you can tell not only who is president this year, but also the presidents of next year and the year after, for offices are dispensed on a fixed "work up" schedule after the pattern of "scrub" baseball on the school playground.

We have no quarrel with the "work up" system of breaking in officers, conceding the value of years of training and experience as third, second and first vice-president before assuming the presidency, but must recognize it as a handicap to the integration movement when, as has happened in some states, the few influential leaders in control of the association oppose integration, again assigning other reasons, because they fear they may miss their chance for the presidency one, two or three years hence.

There are other personal factors, without a doubt, contributing to the desire on the part of some lawyers to defeat integration in their states. You cannot plow a field without overturning some ant hills, most of the inhabitants of which, if given a ballot in a referendum, would vote against plowing.

Very likely the greatest single opponent is inertia, something devoid of moral quality. There are many lawyers so absorbed in their regular clients' affairs that they cannot become interested in any other matter. There are those who are entirely satisfied with the status quo, and in some states conditions are reasonably acceptable. In other states conditions deprive the faint-hearted of all hope. There are always a considerable number of young lawyers, some of whom still believe that their profession is like their law, the perfection of reason, while others are too modest to take a stand.

We realize that the bar is normally suspicious of change. But changes come, often regardless of individual desires. In the extraordinary conditions now prevailing change is the only certainty. In the administration of justice, as in other human affairs, the need of our time, as of all times, is for men willing to subordinate immediate personal advantage for the good of the group, which includes as well their own long-range good.

Credit Justice Proctor for Pretrial Success

The very encouraging report concerning the success of pretrial hearings in the District Court for the District of Columbia, appearing on page eighty, failed to say that during the entire year Justice James M. Proctor had charge of the pretrial docket. The opportunity is here afforded to give Judge Proctor credit and to say that the record is remarkable. The explanation for failure to credit Judge Proctor was due to the fact that the Editor's request for information was addressed to Judge Laws, who requested the clerk's office to supply the information. The Editor wrongly assumed that several judges participated in calling cases for pretrial.

A court of justice should be a public utility, well managed, with the dignity that accords with its importance.—*Carroll T. Bond, C. J.*

True Functions of Public and Private Tribunals*

PERCY WERNER

The following text is taken from an article which was prepared by the late Percy Werner of the St. Louis bar, and was published in this Journal, December, 1919, 3:101. It presents not only an inspiring future for the lawyer, but also a correct—or shall we say idealistic—view of the proper relations of the formal courts to the government which creates them. Will practice ever catch up with theory? The question is in part answered by the present widespread use of commercial arbitration, with and without professional representation. Arbitrators are experts in the quality of goods and in trade practices. Lawyers are experts in the principles of justice.

THE PROPOSED PROCEDURE, stated in its simplest form, is this: where parties having a private disagreement which they are unable to settle, resort to lawyers who are likewise unable to bring about an accord and satisfaction, these lawyers shall elect from among their fellow-members of the bar a judge before whom to try their case, following the statutory form for arbitrations.

Their agreement of submission, stating the subject matter of the controversy with, of course, sufficient certainly that it can always be used in support of proof of *res adjudicata*, constitutes the only pleading in the case. Mere matters of procedure, as to time, place and manner of trial are regulated by the attorneys and arbitrator, or controlled by the latter, as may best suit the convenience of all concerned.

The arbitrator selected will naturally be a specialist in the law pertaining to the particular controversy, a member in high standing at the bar for character and learning. All testimony of any relevancy which the court thus constituted chooses to hear is introduced, because the experienced arbitrator, aided by the advocates of the respective parties, will know what, if any, weight to give to the testimony.

NO NEED FOR DELAY

No time is lost in waiting the convening of a term of court or for the case to be reached on a crowded docket; none in attacks and counter attacks on pleadings; none in the empanelling of a jury. The convenience of the parties and of the witnesses is consulted with reference to their attendance. Wearisome reiterations are abandoned. The opening and closing speeches of counsel and the charge of the judge are done away with.

We are treading no untried field. This system is practically that of continental Europe suited to the democratic tendencies of our people. It has its roots in the perfected procedure of Roman jurisprudence. Our own equity practice borrowed from Rome is a close approach to it. It retains all that is best of our courageous, self-assertive and self-reliant Anglo-Saxon procedure. It does away with the distinction between law and equity so far as relates to practice, together with the technicalities of pleading, trifling exceptions relating to procedure, and rules of evidence which in our great distrust of juries exclude so many matters which are daily considered and acted upon by men in the most important transactions of life, and gets down to the marrow of a controversy in a simple, speedy, direct manner.

The reports of new and interesting cases prepared by arbitrators, or counsel, for our legal periodicals, in lieu of the volumes of reports now literally spawned upon us, may be expected to continue the development in permanent form of our substantive law just as did the studies and *Responsa Prudentium* of the *juris consulti* of Rome develop her *corpus juris* which is our great heritage today.

The state stands ready to exercise its supremacy and enforce the awards of the arbitrator just as it does now to execute the judgment and decrees of its courts. The latter still remain open for those who prefer to resort to them. . .

THE "RAIN" OF LAW

Every citizen is entitled to the easy establishment and full security of his rights by a procedure free from technicality and mystery. We are a self-governing, and a self-reliant,

democratic people. A democrat prefers to stand squarely on his own feet rather than to lean up against the state. There has been too much of rushing to the legislature for aid of every imaginable reform. The "rain" of law has been terrific. Shall we, too, besiege our legislatures with demands for the reform of our procedure in the administration of justice, when we have command of the situation ourselves?

The preliminary report on efficiency in the administration of justice, prepared by a group of eminent citizens for the National Economic League (Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound), contains much valuable matter. Among the suggestions made I cull these:

SPECIALIST JUDGES NEEDED

"The need is for judges who are specialists in the class of causes with which they have to deal." . . . "Rules of procedure should exist only to secure to all parties a fair opportunity to meet the case against them and a full opportunity to present their own case; and nothing should depend on or be obtainable through them except the securing of such opportunity." . . . "Machinery is not the important thing. What is important is that experts be chosen. To that end it is essential that the bar be able to make its influence felt by the selecting authority and that tenure be secure." . . . "The best of which judicial lawmaking is capable may be expected only from the best type of court before which the best type of lawyer practices."

With such suggestions in mind let us consider the possibilities of voluntary tribunals as a democractic ideal for the trial of private differences which give rise to civil actions.

HIGH DUTY OF PUBLIC COURTS

Tremendous economic and social changes are under way. The position of the courts in this country is unique. Their is the last word in government. They sit above the legislatures. All legislation must pass challenge before them. Our courts, concerned now with economic and social questions, face work of incalculable importance. Blackstone under his sub-division of "public laws" mentions only crimes and misdemeanors. Today our courts are beset with constitutional questions and questions and interpretation, construction and operation of public laws, statutes and ordinances, relating to hours and conditions of labor, to women and children, to wages, to relations between capital and labor, to sanitary provisions, to public utilities, to municipal government, with not only the rights of all against each, as involved in our criminal laws, but of each against all, with the rights of property as against the rights of the people, and with the rights of the privileged few as against the rights of the unprivileged many, arising under ever new forms of social legislation and employing the moral and political theories of a young republic in the early stages of the great experiment of self-government, restrained only by its own self-imposed fundamental laws.

The bar of this country must hold true to its historic place. To it society rightfully should look for its stability. It has ever been the preservative of those vital necessities of civilized life, peace and order and security. Never was the need greater for able, scholarly lawyers than in this transitional age. From our ranks our courts are recruited. A sound system for the administration of justice must contain within itself the forces which tend to the elevation of bar and bench, and to an ever-increasing respect of the public for both.

In the last analysis all of our institutions are designed to develop character, to make men. The old theory that the individual was but the means to the state as an end has in Occidental civilization no place. Here the state is the recognized means to the individual as an end. It has taken many centuries to sound the depths of the Master's saying that "the Sabbath was made for man, not man for the Sabbath." We must remember that a democratic state presupposes democratic citizens. It is the national feeling welling up through individuals which gives form and life to our institutions.

> "'Tis not the outward bond that makes the slave,
> But the base, narrow thought within the man."

WHAT OF THE FUTURE?

We have seen that the procedure here proposed has evolved naturally from the past, has been thoroughly tried in continental systems of jurisprudence, has been provided for in exist-

ing legislation, has been encouraged by our courts, is in line with tendencies already manifest among our people, and responds to the demand for expert judges.

Its *basis* is the scientific differentiation between public and private law, between substantive and adjective law, now clear but slowly evolved in the history of jurisprudence. Its *effect*—to make professional what is now non-professional. What may be expected of it for the future? This is the great test. The keynote of western civilization, says Benjamin Kidd, is projected efficiency. Will it have a tendency to bring our people into closer friendly association without diminishing their self-respect and the inclination to stand up for their rights as they conceive them? Will it have a tendency to take out the bitterness of private controversies and the sting out of defeat? Will it have a tendency to bring about a better ordered, more self-respecting and mutually respecting people? Will it encourage rather than discourage the settlement of differences and thus make for real peace? Until individuals in society learn to exercise self-control and forbearance and mutual respect for each other's legal rights, and a willingness to arbitrate private differences, can we reasonably expect it of their aggregations, the nations of the earth?

BOTH LAWYERS AND JUDGES EXALTED

Again, will it have a tendency, by relieving our courts of the obligation of settling purely private controversies, to exalt them in the eyes of the people, to make the people appreciate their great and lasting importance to the public welfare, and the prime necessity of filling the great office of judge with the very best type of our lawyers capable of understanding and discharging their great function as the final arbiters between the majorities and minorities, between the single citizen and the whole people, where these clash? Is it consistent with the now generally accepted suggestions for the improvement of our legal procedure?

Again, will it have a tendency to make better lawyers, to redeem them from the suspicion and reproach which is too much their unhappy lot today; to put an end to technicalities, disingenuities and subtleties that delay, and to delay that defeats, justice; to make for straightforward, conciliatory, common sense, upright advocacy; to make for specialization and expertness in their best sense; to elevate the bar itself to the dignity of the bench?

These are the great questions we have to consider. In this connection, I recall to your mind the words of warning and appeal of Woodrow Wilson:

"Some radical changes we must make in our law and practice. Some reconstruction we must push forward which a new age and new circumstances impose upon us. But we can do it all in calm and sober fashion, like statesmen and patriots. Let us do it also like lawyers. Let us lend a hand to make the structure symmetrical, well-proportioned, solid, perfect. Let no future generation have cause to accuse us of having stood aloof, indifferent, half hostile, or of having impeded the realization of right. Let us make sure that liberty shall never repudiate us as its friends and guides. We are the servants of society, the bond-servants of justice."

A Good Bar Journal Service

The "want ad" section of the News Bulletin of the Iowa State Bar Association performs a service for lawyers of its state unequalled in any of the other bar publications on the JOURNAL'S exchange list. The entire seventh page of the October News Bulletin is devoted to fifty-five paragraph advertisements. Forty of them offer books and libraries for sale, and ten contain offers to buy certain books. One advertiser seeks an opening in the practice, and four offer either employment to lawyers or sale of an established practice. No charge is made, and ads are normally discontinued after three insertions.

Such matter is occasionally seen in other bar journals, but nowhere else has it been so well developed or so much appreciated and used. By establishing such a page or column as a regular feature, other state and local bar publications can still further demonstrate their practical usefulness to the profession.

If laymen were ever to realize how much time is wasted by courts and lawyers on purely procedural matters their respect for the law would become measurably lessened.—*Judge Harry M. Fisher, Chicago.*

Legal Service for the Indigent*

By JOHN S. BRADWAY

The legal aid society is an instrument of justice—doing what it is not practicable for lawyers to do individually on any large scale. The legal profession owes it to itself that wrongs do not go without a remedy because the injured has no advocate. The legal profession owes it to itself to assure the maintenance of an institution which intelligently, and without waste of friction, meets this need and accomplishes through competent organization what lawyers would be glad to accomplish, if it were feasible, through their individual efforts. Does the lawyer ask, who is my neighbor? I answer—the poor man deprived of his just dues.—*Charles E. Hughes.*

MY TOPIC this morning is "Legal Service for the Indigent." There are two words in that topic deserving a brief comment. The word "indigent" refers to the client and not to the lawyer. The word "service" is my starting point. A lawyer may render service on at least three levels. He may have motives of pure selfishness; of enlightened self-interest; or of idealism. My acquaintances among the legal profession are gentlemen. I cannot bring myself to believe they are like a pack of dogs fighting over a bone. I assume that their motives are in the fields of enlightened self interest and idealism. The rewards to a lawyer for rendering legal service to the indigent are of a sort which will not interest a selfish man. But for many people the non-material values in law practice are the ones which make life worth living.

Legal aid is a service which lawyers render to clients who, because of their financial condition, are unable to pay a fee. I will ask you to follow me for a few moments while I consider the question as to whether "legal aid" is a novel and therefore a shocking concept or whether it is a deeply ingrained tradition of the legal profession. Historically, legal aid work was rendered by the Roman bar as a civic duty and privilege. The relation between patron and client was in the nature of a status rather than a contract.[1] During the middle ages, under the guidance of an ecclesiastical bar, legal aid work became applied Christianity.[2] St. Yves, the patron saint of lawyers, who died about 1300, was celebrated for his legal aid service. Upon his death an inscription was placed on his tombstone as follows:

"He was a lawyer, but not a robber—a matter of amazement to the people."[3]

In English legal history legal aid work is not so much a civic or religious duty as a professional obligation arising from historic pronouncements in a long line of bills of rights. A satisfactory starting point is the year 1215 when in the fortieth chapter of Magna Charta, we find the promise: "to no one will we sell; to no one will we refuse or delay, right or justice." To interpret this principle and apply it has become a tradition of the English bar.[4]

In the United States in colonial days lawyers, as a class, rose slowly to a position of leadership; but by 1776 they had reached a point where some said that the American Revolution was a war between the American bar and the English Crown.[5] Out of that struggle came our federal and state constitutions in which the promise of legal aid was made in words like the following:

"All courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course

*Address delivered before the University of Tennessee Law Institute on Nov. 16, 1940; published in the Tennessee Law Review, February number, 1941, to which Review thanks are due for permission to reprint.

†The Author is Professor of Law at Duke University and has been known for a number of years as one of the outstanding leaders in the field of Legal Aid.

1. John M. Maguire, Legal Aid, *Encyclopedia of the Social Sciences*, IX, p. 319.

2. John M. Gest, *The Old Yellow Book* (1927), p. 39 et seq. Mayer C. Goldman, *The Public Defender* (1919), p. 9.

3. *Encyclopedia Brittanica*, "Yves, Saint of Brittany," Vol. 23, p. 427 (14th Edition).

4. "Poor Persons' Procedure," *Report of the Law Society*, London. Annually 1931-1939.

5. Charles R. Beard, The Rise of American Civilization, Vol. I, p. 233.

of law, and right and justice administered without sale, denial or delay."[6]

In the federal constitution the phrase "the equal protection of the law" is used. So it is well within reason to claim that legal aid service to the indigent by the legal profession is a professional tradition and the practical application of two fundamental American principles: (1) that justice, in a democracy, is a matter of right, not of grace; and (2) that in a democracy, before the law all men must be equal. The responsibility of the bar today to perform such service arises from a sense of *noblesse oblige;* from the obligation assumed upon entry into the profession;[7] and from the exclusive control over the practice of law insisted upon in the unauthorized practice acts[8] which forces the bar in return for a monopoly to see that all public business in the field is cared for.

But why is it necessary that the responsibility rest upon any one? Why is it not enough merely to state the principle? The answer lies not in the substantive law, but in the administrative machinery by which justice is brought home to the individual who has a legal right. If the individual has money he can walk into any of your law offices and get a very fine brand of justice. If he does not have money there are two sorts of practical obstacles confronting him. In the first group are such matters as: delay of court procedure;[9] expense of court costs and fees;[10] expense of and need for counsel.[11]

In the second group are such matters as: how is the legal aid client to know what his rights and legal position are or whether he has a problem that should in his own interest be brought to the attention of a lawyer; how is he to know that lawyers are willing to aid him without cost; how is he when he knows no member of the bar to secure one whose training and experience qualifies him to handle the particular type of case. Too often the legal aid client with a meritorious case, through ignorance or timidity, fails to make contact with a lawyer who might be willing to help him. The wrong is unredressed and the client sometimes with and sometimes without justification may develop a sense of frustration about justice in a democracy and contend that there is one law for the rich and another for the poor. Unless something is done to lift the legal aid client over these two types of obstacles the constitutional guarantees, in a realistic sense, are too often unavailing and injustice results. Legal aid work is the task of helping the individual to surmount these obstacles so that he may receive that equal justice to which in a democracy he has a right. It is your privilege and mine, as members of the bar, to do our part in furthering legal aid work as an integral part of the administration of justice.

But someone says: Is it respectable? Is it an activity in which a lawyer may safely engage without tarnishing his reputation? There is a wealth of authority on this point.[12] Since 1920 the American Bar Association has had a standing committee on legal aid work.[13] Some twenty state bar associations have committees on legal aid work. All these committees are satisfied that legal aid work is respectable. Many judges have expressed themselves in similar fashion; as have leading members of the bar.[14] In the last twenty years legal aid work has risen from obscurity. Participation in it is now, as it always has been, an honor-

6. Constitution of Tennessee, Declaration of Rights, Article I, Section 17. Adopted February 23, 1870.

7. The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the Oath of Admission to the Bar formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other states of the union—duties which they are sworn on admission to obey and for the willful violation of which disbarment is provided. "I will never reject from any consideration personal to myself the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God." 62 Rep. A.B.A. 1122 (1937).

8. Hicks and Katz, *Unauthorized Practice of the Law* (A.B.A. 1934), p. 15, et seq.

9. Esther Lucile Brown, *Lawyers and the Promotion of Justice* (1938). 198 ff.

10. Robert E. Stone, On What Basis Should Court Filing Fees Be Fixed, *Social Work Technique* (1938), Vol. 3, p. 182; Goodhart, A. L., *Costs,* 38 Yale L. J. 849 (1929).

11. Reginald Heber Smith, *Justice and the Poor,* Chapter VI; The Third Defect—Expense of Counsel (1919).

12. Many of these are collected in John S. Bradway, *The Work of Legal Aid Committees of Bar Associations* (A.B.A. 1938), p. 1 ff.

13. The most recent report now published is 64 Rep. A.B.A. 226 (1939).

14. Bulletin No. 84 of the National Association of Legal Aid Organizations containing addresses by Harrison Tweed, "What Legal Aid Means to America's Poor"; Charles Evans Hughes, Jr., "Meeting the Need for Legal Aid to the Poor." Bulletin No. 94 containing address by John W. Davis, "Legal Aid Work." *Legal Aid Review* (April, 1926), containing address by Charles Evans Hughes, "The Poor Man and the Law."

able activity. A lawyer need not hesitate. He may take pride in a service which brings prestige to the bar and to himself.

LAWYERS FACE CRITICAL TEST

Someone else says: is there any reason for us to be disturbed about legal aid work at the present time? There are at least two. The interest of the whole country is centered, at the present time, upon the problem of national defense. As far as enemies from without are concerned the problem is for the military rather than for the civil establishment. But in this war we are testing whether this nation or any nation conceived in and dedicated to a republican form of government can long endure. When the question arises as to whether democracy can prevail against other forms of government the lawyer, as much as anyone, has an opportunity to provide an answer. If the administration of justice, as we conceive it, fails then the whole structure may crash in ruins about us. If the time should ever come when the door to the temple of justice, in this country, can be opened only by a golden key, the people may exercise their constitutional right to adopt a new form of government.

Already voices are heard contending that the bar has failed to accomplish the objective for which it was established and urging that it be replaced by a socialized agency,[15] perhaps under the control of laymen. What does the public think of the lawyer? If the newspaper headlines, the motion picture and the comic strip are to be believed, the public thinks more sympathetically of the doctor than of the lawyer, and yet the Federal Government has prosecuted the American Medical Association.[16] Will the Bar find itself next on someone's list?

Public speeches about the glory of the profession and action by courts and legislatures will not long sustain the legal profession if public opinion is against it. One quiet, unostentatious, but very practical and effective way to inform the public of the true worth of the legal profession is through legal aid service. There is no more splendid page in the history of the legal profession than the unwritten record of the unorganized legal aid which individual lawyers have rendered to individual clients without the payment of a fee. There have been few, if any, law offices in this country from which a client with a meritorious claim will be turned away merely because he cannot pay a fee. There is no finer professional tradition than this, but the question remains whether unorganized work is enough in the face of the present emergency and the problems confronting the legal profession as a whole. While the answer necessarily depends in large part upon local conditions in the particular county under consideration it is nevertheless true that in many centers some organization is necessary. The word need not alarm anyone. As used here an informal voluntary committee of a county bar association is an organization just as much as is the New York Legal Aid Society which handles 30,000 cases a year. The term is flexible and is used in the sense of an effort to fix responsibility.

RESPONSIBILITY JOINT AND SEVERAL

There are several definite reasons for organized legal aid work. The problem of administering justice rests not so much upon the individual lawyer as it does upon the legal profession. Individual lawyers do the work, but no one need feel the entire obligation any more than the individual physician should expect to shoulder the health program of a given community. By sharing the load each one does his bit and no one is over-burdened. The creation of even a formal organization does not interfere with any charity work a lawyer may desire to do on his own account. The legal aid committee or society, as the case may be, takes only those matters which individual lawyers do not or cannot handle. Many lawyers find it a relief to be able to send such cases to an organization.

An organization is often more effective than the individual lawyer because it is easier for the client to know about and to reach; it keeps records of its work comparable to the public health statistics which are so valuable to the medical profession; it becomes more or less expert in a field of law in which few lawyers find

15. F. Lundberg, *The Legal Profession, A Social Phenomenon*, 178 Harpers, pp. 1-14 (1938); F. Lundberg, *Priesthood of the Law*, 178 Harpers, pp. 515-26 (April, 1939); F. Rodell, *Woe Unto You Lawyers* (1939); Robinson, *Law and Lawyers* (1935).

16. "Practice of Medicine and the Sherman Anti-Trust Law," Science NS. 91: 257-8 (March 15, 1940); Rosenbeck, "The American Medical Association and the Anti-Trust Laws," 8 Fordham L. R. 82-102 (1939); "The Sherman Act and the Medical Profession," 34 Ill. L. R. 602-7 (1940).

occasion to specialize and can save time in many routine recurring situations. But the most persuasive argument is that in many counties the task, if it is to be done properly, is far too large to be cared for by individual voluntary aid. Unless part of the task is to be slighted or the work done on an inferior scale, in such areas an organization, however simple, is necessary.

In Durham, North Carolina, a city of some 60,000 population, where my own legal aid organization operates, about 400 cases a year come for attention. Since Knoxville is larger, one may assume, till further facts are available, that there probably are more cases here. The individual lawyers in either city would find such a charitable load difficult, if not impossible, to carry, when his duty to his family requires that he spend most of his time on cases from which fees are available. But even in smaller communities the fact that the bar association has a legal aid committee, even if its duties are purely nominal, is notice to the public that the legal profession is prepared to do its bit. Such a committee at the end of the year can make a report of its work and the newspapers will carry the report even if the names of the committee members are eliminated. The public will know that the bar is conscious of its obligation in this respect. A legal aid organization, even a simple, informal one, has advantages which cannot be achieved by individual service and it does not interfere with individual service.

Assuming that an "organization" exists, what sort of legal aid problems may be anticipated? If you will pardon a personal reference I shall discuss the matter from the standpoint of my own organization because I can be more definite about it. Applicants to my office may be listed under any one of several categories.

First is the man who can pay a fee. Into every legal aid organization come people who can pay a fee. They have various reasons and each one must be dealt with on his own merits. There is no reason why such people should not come to a legal aid organization; the question is as to what is to be done about them and their cases. Let me tell you of several rules we make and enforce.

PRACTICAL RULES OF OPERATION

1. We will not take cases or clients where a fee or a contingent fee can be paid or where, as a result of the proceedings, a sum is likely to be raised up out of which a fee could be paid.

2. We will investigate every case and every applicant to see whether the matter lies within our jurisdiction and the final decision on this point is not made at any time while we are handling the matter.

a. When the applicant calls we inquire from him facts about his financial background, such as: whether or not he is employed; what are his wages; what rent does he pay; what dependents has he; does he have a bank account, real estate, an automobile. On the basis of his answers we may reject the matter.

b. Even if we accept the case the action is tentative. We reserve the right to withdraw from it at any time that it appears a fee will be available. At the time of such withdrawal we give the applicant plenty of opportunity to secure another attorney and we turn over to that attorney the results of any work we may have done on the case.

c. We have a standing invitation to the members of the local bar to come to our office and go over the facts of any case in our files in which they may have an interest. We will withdraw if they think we should not handle the matter.

d. Most cases are either clearly in or outside our jurisdiction. When a marginal case appears we usually phone the President of the Bar Association or some other prominent attorney, lay the facts before him and abide by his decision.

3. When it appears that a case is outside our jurisdiction we do not refer to any particular lawyer. At the suggestion of the local bar association we give the applicant a telephone directory and let him pick his own counsel. Whatever the applicant may think of such a plan, we at least, have complied with an agreement not to refer the case to any particular lawyer.

One result of this rather elaborate system of separating legal aid from non-legal aid clients we believe is to educate a number of persons who otherwise might never have sought the services of a lawyer to appreciate the value of such aid. The bar has profited from some of their fees.

The second type of applicant is the man who wants advice. He does not ask to accomplish

anything. He merely wants to know, to talk matters over, to clarify his own thinking. Perhaps in fifty percent of the cases the applicant falls in this category. May I give you two examples:

ADVICE IS VALUED

Some years ago a lady and gentleman came into my office and announced that they wanted a divorce. With a view to determining whether a reconciliation was possible I inquired the cause of the difference. They replied that they had had a terrific quarrel and that it was over a question of law. They wanted to know, as a matter of law, whose duty it was to get up first in the morning and close the windows. You gentlemen in Tennessee, no doubt, know the answer to the legal question, so I need not pursue it further. But note the opportunity which a lawyer has in such a matter to act the part of a conciliator. Incidentally, I might remark that my office takes few divorce cases, and then only when the client supplies me with a letter from the County Superintendent of Public Welfare indicating that he has examined the situation and recommends a divorce for the best interests of the family.

Some years ago a little, red-faced, white-haired old farmer came in. He told me he had hitch-hiked one hundred and fifty miles to see me. When I asked him what the trouble was he said, "I am going to commit a murder and I wanted to talk to you first." Usually I am flattered when someone regards me as an expert. In this instance there was a very serious job to be done. If the man actually committed the murder after talking to me I could think of several headlines in the newspapers which would give me more publicity than I desired. Here was an opportunity. I hope my efforts were successful. As far as I know the murder never took place. A third type of client is the man who wants a case adjusted out of court. My illustration here is of a woman, a cook. She came in one fall and told me that she had had a dispute with a dressmaker regarding the style of her dress. It seemed that the preceding spring her dress being out of the prevailing style, she had taken it to the dressmaker with instructions to bring it up to date. The price agreed upon was one dollar. The cook went away in the summer with the family for which she was working and returned in the fall to find the dress altered in accordance with the spring styles. Unfortunately during the summer the styles had changed again so the dress was still out of style. A dispute developed as to whether the dressmaker had followed instructions and when the parties could not agree the cook came to me pondering legal action.

I persuaded both parties to come in for a conference and on the afternoon designated I heard a great noise in the waiting room. On investigation I found that each party had brought with her fifteen or twenty witnesses and the witnesses were already making clear which cause they championed. Fearing that the matter might come to a point where I should have to arbitrate a question of styles, I hurriedly invited both principals into my private office. I asked the cook if she would give 50 cents for the dress in its present condition. She said she would. I asked the dressmaker if she would part with the dress for 50 cents. She said she would. The parties exchanged 50 cents and the dress; shook hands and went out the side door, apparently the best of friends. They left me to spend the balance of the day trying to persuade the witnesses that, in spite of appearances, justice had been done.

You will note the opportunity here for the lawyer to aid in adjustment of difficulties. Amusing as these illustrations may seem to us, it is well never to forget that, to the people involved, such matters are of the most serious significance. We can hardly measure their magnitude. All of them are legal aid problems and clients. If there had been no organized legal aid service these matters might never have come to light. Certain it is that a legal aid office provides no incentive to litigation. If time permitted I could cite you cases which have been fought up to the appellate courts[17] on behalf of legal aid clients and other matters which have warranted presentation of the facts to the legislatures for redress. The presence of organized legal aid work insures adequate inspection of problems of this sort so that if litigation or legislation is necessary it may be some definite person's responsibility to see that appropriate action is taken, but there is every inducement to amicable settlement.

17. An example of a legal aid case taken to the Supreme Court of the United States is Bountiful Brick Co. v. Giles, 276 U. S. 97, 72 L. ed. 483, 48 Sup. Ct. 221 (1928).

So often what is everybody's business becomes nobody's business.

In conclusion, let me summarize. The motives behind legal service by lawyers to indigent clients are in the fields of enlightened self interest and idealism. Legal aid work itself is a practical application of a democratic principle that before the law all men must be equal. Tradition, and self interest both encourage the Bar to see that the principle is made effective in the lives of our fellow citizens. The most desirable way to accomplish the objective is to add to the individual work of members of the bar a legal aid committee or more formal organization if the local need justifies it.

Information is available as to how to set up and run such organizations.[18] The result is not to encourage litigation, but to promote amicable settlement of disputes and educate a large section of the public to appreciate the value of standard legal services. The task of weeding out those applicants and cases where a fee can be paid is purely an administrative matter and presents no real obstacle.

Today more than ever the organized Bar in this country needs a public relations program. It is fitting that one of the planks in that program should be humanitarian. I suggest for your earnest consideration the subject of legal aid for the indigent as a proper humanitarian plank in the public relations program of the organized Bar.

18. The National Association of Legal Aid Organizations has just issued a "Tentative Bibliography of Material on Legal Aid Work."

Conspicuous Waste of Space in Digests

By JOHN E. TRACY*

I have been very much interested in the campaign, in which you have had a part, to reduce the expense of maintaining a law library through the shortening of judicial opinions and the omission from the reports of opinions that add nothing to the law. Apparently the campaign is making some progress, for I have noticed a considerable shortening of the opinions in certain courts.

In this connection I wonder whether those who are working on this problem have ever given any consideration to the large proportion of space in every published volume of reports which is devoted to headnotes and digest material. This thought has occurred to me several times of late and particularly today when I was examining advance sheets of the Northwestern Reporter for September 9, 1942, being 5 N.W. (2d) pp. 145-320. I find that in that number, out of 175 pages of text, approximately 34½ pages are taken up by headnotes, being about twenty per cent of the total. If, to the space devoted to headnotes, should be added the space devoted in the same number to digest material, including statutes construed and words and phrases construed, the non-opinion material would amount to approximately 56 pages, or twenty-eight per cent of the total number. At the top of one case I find two and one-half pages of headnotes, although the total text of the opinion is only five and one-quarter pages.

This very large proportion of space in our reports which is devoted to headnotes is due, in my opinion, to two things: (1) The key-numbering system of the digesters requires them to often put one ruling by the court under a number of separate headings, so that instead of there being one headnote to show the holding of the court, there may be three or four headnotes almost in identical language. (2) In those jurisdictions where the syllabus is furnished by the court, the publisher inserts not only the court syllabus but an entirely different set of headnotes by the publisher's staff, so that it is not only an unnecessary duplication, but the publisher's headnotes, due to the key-numbering system, are rarely as few as those of the court. For example, in the case to which I have referred, where there were two and one-half pages of headnotes to five and one-quarter pages of opinion, the official syllabus had four-

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teen subdivisions, while the publisher's headnotes numbered twenty-two.

In another case which I picked at random there were three sections of the syllabus prepared by the court and the same number in that prepared by the publisher; numbers one and two are identical in language so far as I can see, and number three of the publisher is the same as number three of the court except that the sentence is turned around to read differently. In that case the publisher could have used the official syllabus without change by simply giving it the publisher's key numbers.

Inasmuch as the members of the bar are all paying for this unnecessary duplication of material, what can be done to save this apparent wasting of space in law reports? It would seem to me that the bar committees who are working on this problem should be able to persuade the publishers (1) to devise some system of cross-referencing, so that the same long paragraph will not be repeated under several different key numbers, and (2) that where the syllabus is prepared by the court the publishers print that as the only syllabus, key-numbering it to their own system as best they can.

I might add one more observation: As I understand it, the digests are made up by taking out and rearranging the headnotes from the various cases in the reports. This means that much duplicate material is going into the digests, further adding to the crowding of the lawyer's shelves with an unnecessary number of books.

A New Book in the Field of Evidence

Photographic Evidence — Preparation and Presentation. Charles C. Scott. Vernon Book Co., Kansas City, Mo.

More and more each year photographs are being used in court. The very competent and complete treatment of the subject by Scott implies an advance in methods of proof. The "Preparation of Photographic Evidence" is given 470 pages, and nearly as many are devoted to "Presentation." All of the numerous new features of photographic work developed in recent years are dealt with, technically and accompanied by hundreds of citations. Because photographs are coming into use more often each year, the practitioner who does not have access to this volume will be at a serious disadvantage.

The recent use of ultra-violet and infra-red photographs calls for such a modern and complete volume. There are twenty-five pages devoted to "legal portraits," twenty-one to "real property pictures," eleven to "damaged vehicles," twenty-five to pavement defects and obstructions," nineteen to "skid marks and tire tracks," and fifty-six pages to "traffic accident scenes" in general.

This subject has not yet been much dealt with in law study, the result being that the practitioner often is unable to get the most desirable illustrations in his own case, and is almost helpless as a critic of the photographs offered by his opponent. Often photographers are not well qualified on the evidential value and significance of photographs, so a carefully framed technical question may lead a photographer to make admissions which seriously weaken the force and value of the evidence that the opposition offers.

In recent years the tendency in the law has been to require illustrations and reasons for opinions. Many excellent opinions now say definitely that without reasons and illustrations expert testimony that is capable of being illustrated deserves but little consideration. This is a long forward step from reliance on an expert witness who was presented mainly as one who had a number of scholastic degrees and was permitted to give only a bare opinion. Now such a witness is not only asked for his opinion but also for reasons sustaining it.

The author is himself a lawyer as well as technically qualified in this comparativey new field of the law of evidence. A trial attorney in a technical case of the kind mentioned will have a distinct advantage over an adversary not so prepared. The book will have equal value for photographers with its hundreds of suggestions and warnings. It is inconceivable that a modern, well equipped law library will not contain this volume.—*Albert S. Osborn, New York City, Nov. 14, 1942.*

The Courts and the Papermills*

JOHN B. WINSLOW[1]

"The lawyer ceases to reason and becomes a mere digger in the dust-heap of decisions."

DURING THE first half dozen years of my quarter century of service on the supreme bench of Wisconsin, I had the good fortune to be associated with Mr. Justice Pinney, one of the ablest lawyers, who has ever graced that bench. My room was next to his on the little corridor in the old capitol into which the rooms of all the justices opened, and, as his friends were generally my friends, and our views on legal and political subject closely akin, we visited much together, greatly to my advantage.

He had been an active practitioner for many years, his acquaintance among the bar of the state was very large, and as his door always stood ajar, he naturally received many calls from his former comrades at the bar as they came to the capitol to argue their cases in the supreme court. Among these callers none was more welcome than Col. Gilbert M. Woodward, of La Crosse, now deceased, a lawyer of the highest standing and a gentleman as delightful in conversation as he was admirable in character.

A remark made by the Colonel on one of these occasions has always remained in my memory. As he came to Judge Pinney's open door he found the judge surrounded by a small fortification of law books, hard at work on an opinion. Stopping a moment in the doorway and taking in the situation, he said, with that quizzical gleam of the eye which all who knew him well remember, "Pinney, I'd rather be a dog and chew rags for a papermill than have your job."

I had never heard the phrase before, and its homely expressiveness fixed it in my memory. Of course it was intended as a mere pleasantry and it was received as such, but for years the conviction has been growing in my mind that it was really something more than a pleasantry and that it embodied a serious question which is increasing in importance with every passing year, namely, the question whether we are not in danger of being overwhelmed with the rapidly rising flood of case law.

It would be foolish to underestimate the value of the systematic preservation and following of precedent. This marked feature of our legal history has been very helpful to our jurisprudence especially along the line of stability and certainty. But there may well be too much even of a good thing, and the question is whether we are not allowing our regard for precedent to run away with us. If we had but one court of last resort writing and publishing opinions, the situation might be viewed with calmness. Three or four volumes of reports a year need not seriously disturb anyone's equanimity, provided always that the opinions be legally sound, but instead of one court we have nearly fifty courts of last resort in the United States, to say nothing of various intermediate courts, all writing and publishing opinions as if their very lives and salaries depended on the number of pages which they annually filled.

According to a reliable count published not very long since, there were reported during the five years from 1909 to 1913, inclusive, 65,379 decisions made by federal and state courts of last resort, filling 630 volumes, of which decisions 1,061 were rendered by the federal supreme court. Sixty-five thousand precedents added to the already existing myriads of precedent in the brief space of five years! Six hundred and thirty additional volumes demanding and receiving shelf room in our law libraries during a five-year period elapsing during the infancy of the nation's jurisprudence! Looking ahead a half century to the time when there shall be two or three times as many in-

*This article was written for the Illinois Law Review, and was published in Vol. X, No. 3, p. 157 (Oct., 1915).

1. Chief Justice of the Wisconsin Supreme Court; A member of the Board of Directors of the Am. Jud. Soc. from its inception until his death in 1920.

habitants within our borders and a corresponding increase in our litigation, what are we to expect if the present rate of production of precedents be maintained? The law library of the future staggers the imagination as one thinks of rank upon rank, and tier upon tier, all loaded with their many volumes of precious precedents. One shrinks from the contemplation of the intellectual giants who will be competent to keep track of the authorities and make briefs in those days; they, as well as the judges who pass upon the briefs, must needs be supermen indeed.

That this ever increasing output of decisions should go on indefinitely is certainly not to be anticipated with calmness. Even at the present time the volume of case law has become a burden. Briefs are becoming steadily more bulky and untrue to their name and function. Instead of being compact discussions of legal principles applicable to the case they are fast assuming the proportions of volumes where page after page is devoted to the enumeration of precedents which the industrious brief-maker has found in his search for cases on all fours with his own. The lawyer ceases to reason and becomes a mere digger in the dust-heap of decisions. Many a time have I spent hours in the examination of the multitudinous authorities cited in such a brief only to find that I have made no advance, and such must be the experience of my brethren on the bench.

One great difficulty is that so many of the decided cases add nothing to the substantive law; many of them simply reaffirm, with some difference in expression, established principles and consume page after page in stating facts which, when stated, serve only to perpetuate some more or less unsavory quarrel.

Let me illustrate by citing an opinion of my own. The case was one brought by a father for the purpose of setting aside a deed of land made in consideration of an agreement by the son to support the father. More than three printed pages are consumed with a statement of the facts; the opinion, occupying a page, simply states the principle, long established in Wisconsin, that where such a conveyance is made by father to son and the son fails to perform his promise, the agreement to support will be treated by the court as a condition subsequent and the conveyance will be set aside if the conditions be deliberately broken. This opinion adds nothing to our jurisprudence nor does any opinion of a similar character. It simply fills up the reports and encumbers the shelves. It is the merest judicial lumber.

Another class of useless cases consists of those in which the appellate court reviews and tries over again the facts found by the trial court. In these cases the consumption of space in the reports is probably more flagrantly useless than in the class first named because it frequently becomes necessary to discuss the evidence on both sides at great length, especially in case of reversal.

Other classes of practically useless opinions might easily be named and dwelt upon, as for instance, the opinions on mere minor questions of practice or procedure, which in some jurisdictions are very numerous, but as the purpose of this article is not to convince anyone that opinions are too numerous, but rather to suggest to those already convinced some means by which the number of opinions may be substantially reduced, I desist in this line.

Assuming then that there is a serious abuse here that demands correction, the urgent questions would seem clearly to be, what measures can be taken to correct the abuse? And when should they begin?

Taking these questions in reverse order, I presume there will be no disagreement as to the proposition that, if we are sure of the measures which ought to be taken, the sooner we begin them the better, for it will inevitably be a long and hard task to make substantial changes in a system which has become so deeply intrenched as this.

In presenting a few proposed relief measures which seem sensible and practicable to me, I wish it to be understood that I am not presenting them dogmatically but rather by way of suggestion and invitation to discussion by others.

The measures which I suggest are partly legislative, and partly administrative, and I will take up the legislative first.

LEGISLATION MAY SERVE

1. Wherever there exists a law requiring the filing of an opinion in every case, it should be replaced by an act putting the whole matter

in the discretion of the court. If not placed wholly within the discretion of the court, a law in substance like the Ohio statute on the subject would be quite satisfactory. For the benefit of those who have not access to the Ohio law, I may say that it provides in substance that the court shall cause to be reported with all practicable brevity all decisions which determine or modify an unsettled or new and important question of law, or construe an ambiguous or doubtful statute, and such other of its decisions as it deems of public interest and importance. Under this law the reported cases in Ohio do not fill more than a volume a year.

2. All demurrers except the general demurrer should be abolished and there should be no pleading over. The order sustaining or overruling a demurrer should be automatically followed by judgment on the merits. All other matters forming grounds for demurrer under the present practice should be brought before the court by motion and there should be no independent appeal from the decision of the trial court on the motion.

3. Appeals should only be allowed, (a) from final judgments, (b) from orders granting, denying, or modifying a provisional remedy, (c) from orders preventing a judgment or substantially involving the merits and not remediable upon appeal from the judgment. If appeals be allowed from any other orders they should not be allowed as matter of right but only in the discretion of the court upon a showing that a question of importance either to the parties or to the public at large is involved.

FOUR RULES OF COURT

While these legislative changes would not reduce the output of opinions very largely they would unquestionably have an appreciable effect. I am quite well aware, however, that the most effective measures are measures which must be taken by the courts themselves, and I now proceed to state what in my judgment those measures should be.

1. No opinion should ever be written upon an affirmance where only questions of fact are involved. In such cases an affirmance means that the findings of fact are sustained by the evidence and an opinion really says nothing more.

2. No opinion should be written upon an affirmance where the case is determined by following a legal principle or principles well established by previous decisions in the same court.

3. No opinion should be written upon affirmance upon a mere question of practice or procedure unless, in the judgment of the court, the question be one of such importance in the administration of the law that it should be settled by an authoritative pronouncement from the court of last resort.

4. In cases of affirmance generally no opinion should be written unless in the judgment of the court the question is of such exceptional importance as to demand treatment in an opinion.

As a large majority of the decisions of courts of last resort are affirmances it seems quite apparent that careful application of these four rules would make a very considerable reduction in the number of opinions written.

If it be objected that subdivision four is too vague and indefinite to be of any value, I have to admit that the efficiency of this subdivision will depend entirely on the personal views of the judges administering it. In my opinion, the principles which should be applied in determining whether the question is "of such exceptional importance as to demand treatment" are substantially as follows: A question demands treatment if it is necessary in deciding it to (a) construe a provision of constitutional or statutory law or modify a previous construction thereof; (b) announce a new or modify an existing principle of law or settle a question on which the authorities in the jurisdiction conflict; (c) determine a question of such general importance to the public at large as to make its authoritative settlement an apparent public duty.

In cases of reversal it is clear that there must generally be an opinion written. This is especially true where there must be a new trial or further proceedings taken in the trial court. In cases of reversal on questions of fact, however, an opinion is only needed for the information of the parties or the trial court and is absolutely valueless as a precedent. In all such cases it seems that it would be well to prohibit its publication in the reports. I confess that

the question of how such an opinion can be kept away from the *pernicious activity of private reporting systems* is a very difficult one.

"WE WRITE TOO MUCH"

Finally, I may say (I hope without offense to my brethren on the bench) that in my judgment the great mass of opinions are too long. We write too much. We do not confine ourselves to the points really necessary to be decided. In many cases the syllabus would constitute a better opinion than the opinion itself. There is a great temptation to enlarge on a question which is interesting and important, to indulge in simile and illustration, to venture into a discussion of cognate questions and in effect to write a legal monograph, but the temptation ought not to be yielded to. The time has gone when a judge can hope, like a Marshall or a Kent, to map out in advance the entire law on any subject. He has not the time to do it even granting that he has the ability. He should confine himself to the actual questions presented and in deciding them his aim should be to treat them as briefly as possible consistently with clearness and certainty. It is more difficult to write such opinions than to write long ones but the result amply justifies the extra labor.

I have probably sinned as much as any of my brethren against the principles which I am now laying down, but I believe that I have learned some things from my long experience on the appellate bench. I hope to stay on that bench long enough to see a great reduction in the number and volume of printed opinions; long enough to see the decisions of the Wisconsin supreme court for an entire year contained in a single volume; long enough to see the time when the courts shall cease to "chew rags for papermills."

Views Concerning Opinion Writing

A Federal Judge Says—

"I have always thought the best way to reduce the number of published opinions would be to have some group of impartial men, presumably judges, appoint a committee who would be authorized to employ one or two law assistants, and this group should determine what opinions should be printed. It can't well be left to the publishing company, which has a direct interest and cannot well offend judges whose opinions are submitted. Likewise some of the publishing companies are not equipped to make the best selections. . . . I should think the most practical way would be for Congress to impose upon the Conference of Senior Circuit Judges the duty of naming the committee which would designate the opinions to be published where written by the federal courts or bodies which are created by Congress and perform quasi-judicial functions."

Concise Statement of Formula Applied—

Though favoring shorter opinions as a "consummation devoutly to be wished" the writer would stress with great vigor the importance of an opinion to accompany each final decision. It will hurt nobody and will promote better general understanding and administration if the court is required to justify or explain its decisions in a concise statement of the formula applied.—*Louis H. Solomon.*

English System of Selection Favored—

It was my experience, while on the bench, that every lawyer is perfectly willing that the cases of other attorneys should be disposed of by brief and cursory opinions but in his own case every point that he raises has merit and is entitled to real consideration and deserves to be treated in the opinion.

I believe the idea of selection of opinions for publication is a good one but there would have to be some selecting body other than the judges who write the opinions. Perhaps the English plan of selecting cases for reporting could be adopted with some modifications.

Publisher's Competition vs. Patriotism

Referring to the elimination of competition by publishers of advance sheet services Chief Justice Gibson of the California supreme court, to whom the accomplishment is credited, said: "The confusion and duplication of work will be eliminated and the joinder of the efforts of the two [publishers'] organizations gives promise of continual improvement in the service. It is noteworthy that the discussions leading to this settlement were concluded at a time when the conservation of materials and labor has become a patriotic duty."

Justice Is Dependent Upon Administrative Methods

[Lawyers who respect their profession can hardly avoid knowledge of the genuine success of the Administrative Office of the United States Courts. System, order, economy, all essential elements ofsuccessful administration, are now the routine agents of the entire system. Observing this how long must it be before similar business methods are conferred upon state courts?

The report for the preceding fiscal year was approved by the Conference of Senior Circuit Judges September 29. A few extracts especially deserve publication in this Journal.]

An example of reduction in cost of operation is cited in the mileage and per diem of jurors. This dropped from around $1,980,000 in 1940 to around $1,770,000 in 1942, a decrease in the annual cost for jurors in two years of more than $200,000. The report shows that various factors enter into this: one is the lessening in the proportion of cases which are tried before juries and the increase in the proportion submitted to the judge without a jury. Pretrial conferences simplify and reduce to a minimum the questions in dispute. They often lead to settlements and nearly always reduce the time required for trial. Consequently less time is taken for the service of the jurors in the case if a jury is not waived. . . .

In part the saving in expense of jurors is due to greater care on the part of the courts in arranging for the attendance of jurors so as to reduce as far as possible the idle time for which they are paid. The United States District Court in Detroit reduced the cost of petit juries in that court from around $47,000 in 1941 to around $42,000 in 1942, a decrease of 11 percent in the face of the fact that the number of jury trials and the number of days of such trials increased.

JUDGES' TIME IS NOT WASTED

Emphasis continues to be placed by the Administrative Office upon the assignment by the Chief Justice of district judges who can spare some time from the work of their own districts to hold court in other districts where the pressure of work is greater. During the last court year thirty-five judges were designated for service in district courts outside of their circuits, of whom 11 went to the Southern District of New York, and nine to the District of Columbia. The aim of this policy as the report states "is to impart added flexibility to the federal judiciary and enable it to reinforce points of strain at any time".

The report states that the use of pretrial procedure in the federal courts continues to be helpful in expediting the dispatch of business. Honorable John C. Knox, Senior United States District Judge for the Southern District of New York says of the use of this method in his court during the last year "Pre-trial conferences again proved themselves to be an effective means of disposing of business". The report says, "There is general recognition that in the present period of war, when it is necessary to conserve every ounce of labor power, the fullest practicable application of pretrial procedure and the economy of time on the part of judges, jurors, lawyers and litigants that it brings are especially desirable."

After the law has been fully restated, and the last improvement has been made in rules of procedure, we must still look to our judges, and especially to those who sit in the trial of cases where the facts are elicited and the rules of law are applied, for the true administration of justice.—*Charles Evans Hughes.*